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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION**

INDIGENOUS ENVIRONMENTAL NETWORK, <i>et al.</i> , and NORTHERN PLAINS RESOURCE COUNCIL, <i>et al.</i> , Plaintiffs, v.	CV 17-29-GF-BMM CV 17-31-GF-BMM Consolidated DEFENDANTS' RESPONSE TO DEFENDANT-INTERVENORS' MOTION TO AMEND THE COURT'S ORDER ON SUMMARY JUDGMENT
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UNITED STATES DEPARTMENT OF
STATE, *et al.*,

Defendants,
and

TRANSCANADA CORPORATION, *et al.*,

Defendant-Intervenors.

Federal Defendants hereby respond to Defendant-Intervenors' Motion to Amend the Court's Order on Summary Judgment (ECF No. 221). Federal Defendants support the arguments made in Defendant-Intervenors TransCanada Corp. *et al.*'s motion and agree that the Court's permanent injunction, as specifically phrased by the Court in the summary judgment order, was overly broad because the plain text of that order would appear to prohibit *all* pre-construction and planning activities related to the Keystone XL Pipeline. For the reasons discussed in TransCanada's motion, the order should be amended to allow TransCanada to conduct preconstruction activities related to the Keystone XL Pipeline which do not require the government's approval.¹

¹ TransCanada's motion does not request reconsideration of the decision to vacate the record of decision, but expressly reserves the right to seek a stay of the Court's order should they seek to appeal. *See* Def.-Ints.' Mem. in Supp. of Mot. to Amend the Court's Order on Summ. J. ("TC Mem.") at 2 n.1 (ECF No. 222). Federal Defendants likewise address only the Court's permanent injunction in this response and reserve the right to seek a stay of the Court's vacatur at a later date. Federal

As discussed at the status conference on November 28, 2018, Federal Defendants are concerned that the Court's order could be construed as precluding federal government agencies from considering applications relating to the Keystone XL Pipeline, as well as conducting environmental reviews relating to those applications. Federal Defendants understand, based on the Court's statements at the status conference, that the Court's order does not enjoin the consideration of applications relating to Keystone XL, including the preparation of any environmental analyses and potential decision documents relating to those applications.

For example, the Court's order instructs the U.S. Department of State ("State Department"), in conjunction with other federal agencies, to prepare an additional National Environmental Policy Act ("NEPA") analysis to address the issue identified in the Court's order and also to work on a revised national interest determination to address the Court's ruling on the Administrative Procedure Act claim. The Court also directed the State Department to further consult with the U.S. Fish and Wildlife Service regarding potential adverse impacts to endangered species from the Keystone XL Pipeline, including addressing updated information on oil spills and route changes in Nebraska. Based on the Court's statements at the

Defendants also expressly reserve and do not waive other appellate remedies that may be available.

hearing and the Court's minute entry (ECF No. 227), Federal Defendants understand that all such activities are not subject to the Court's injunction.²

An issue remains, however, with respect to cultural, biological, and other surveys that a federal agency or TransCanada may conduct in conjunction with environmental reviews relating to the Keystone XL Pipeline. The Court has deferred a ruling regarding the "field activities" referenced in paragraph 18 of the Declaration of Norrie Ramsay (ECF No. 222-1). Those activities include "cultural, biological, civil and other surveys." *Id.* ¶ 18. The Court's summary judgment order instructs the State Department to supplement the NEPA analysis of cultural resources, which may involve additional survey work. *See* November 8, 2018 Order at 27 (ECF No. 218). Similarly, addressing the ESA issues found by the Court may involve additional wildlife surveys. *See id.* at 44. Cultural and wildlife surveys, and potentially other types of surveys, also may be conducted to complete environmental analyses in conjunction with permit applications relating to the Keystone XL Pipeline.

Accordingly, Federal Defendants respectfully request that the Court clarify

² Similarly, Federal Defendants understand that the Court's order does not restrict other agencies' ability to evaluate and conduct environmental reviews in relation to applications pending before them that relate to the Keystone XL Pipeline, such as the Clean Water Act permits pending before the U.S. Army Corps of Engineers (which is not a defendant in this case) and the right-of-way application pending before the Bureau of Land Management. *See* TC Mem. at 4-5 (ECF No. 222).

that its summary judgment order does not preclude federal agencies or TransCanada from conducting environmental reviews relating to the Keystone XL Pipeline, including related cultural, biological, and other surveys.

Respectfully submitted this 29th day of November, 2018,

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CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2018, a copy of the foregoing Defendants' Response to Defendant-Intervenors' Motion to Amend the Court's Order on Summary Judgment was served on all counsel of record via the Court's CM/ECF system.

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